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THE NEW YORK RULE IN REGARD TO LESSER DEGREES OF CRIME

IT was a well established rule of the common law that a defendant, accused of the commission of a crime, might properly be convicted of the crime charged in the indictment or of any lesser offense constituted by the acts set forth in the indictment and proven upon the trial.¹ Though the evidence fail to support every allegation of the indictment, proof of such of the acts averred as would constitute a lesser offense would justify a conviction for the lesser crime and the unproved allegations of the indictment would be treated as mere surplusage. This rule was subject, however, to an important exception, in that upon an indictment for a felony no conviction could be had for a misdemeanor, as certain privileges afforded the accused charged with a misdemeanor were not available upon trial for a felony.²

The codification of the criminal law in New York has embodied this common law rule, but its statutory expression ³

¹ *People v. White*, 22 Wend. 167 (N. Y. 1839); *People v. Jackson*, 3 Hill 92 (N. Y. 1842); *People v. McDonald*, 49 Hun 47, 1 N. Y. Supp. 703 (5th Dept. 1888).

² The privileges of a defendant on trial for a misdemeanor not available upon a trial for a felony included the right to appear by counsel, to have a copy of the indictment and a special jury. This exception did not prevail in New York. *People v. White*, 22 Wend. 167 (N. Y. 1839); *People v. Jackson*, 3 Hill 92 (N. Y. 1842), *supra* note 1; *Dedieu v. People*, 22 N. Y. 180 (1860), *infra* note 4.

³ N. Y. PENAL LAW § 610 provides:

"Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."

N. Y. CODE CRIM. PROC. § 444 provides:

"Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime. Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence. A conviction upon a charge of assault is not a bar to the subsequent prosecution for manslaughter or murder, if the person assaulted dies after conviction, in case death results from the injury caused by the assault."

is couched in language which has suffered conflicting interpretations, made its proper application difficult, and has furnished a popular ground for appeals by convicted defendants even to the present day.

The primary source of confusion sprang from the limitation of the rule, by the wording of the first statute, to "crimes consisting of different degrees". Early in the case history of this subject it was contended that upon prosecutions for crimes divided into degrees the statute authorized a conviction of any inferior degree of the crime charged, though the acts proven upon the trial and upon which the verdict was rendered were not included in those alleged in the indictment. Such construction of the statute would of course alter the fundamental rule of criminal jurisprudence that the accused need answer only the charge preferred in the indictment. The Court of Appeals in the case of *Dedieu v. People*⁴ expressly denied that the legislature had intended, by dividing certain crimes into degrees, to classify every lesser degree as an inherent part of the greater, so that an indictment for the higher degree would include a charge upon the lower. On the contrary, the court carefully pointed out that the division of crimes into different degrees was merely an effort toward a more discriminating arrangement than existed at common law, saying: "The idea of distinguishing them numerically as different degrees of a generic offense was simply a matter of terminology. Their legal character and relations would have been precisely the same, if an additional set of names has been invented and attached to the different descriptions of crime."⁵ Therefore, the classification of any one crime as a lesser degree of another does not thereby include the lesser as one of the offenses charged in an indictment upon the greater. Thus in a trial upon an indictment

N. Y. CODE CRIM. PROC. § 445 provides:

"In all other cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment."

Section 444 was first enacted in slightly different form in Revised Statutes of 1829 (2 REV. STAT. 702 § 27).

⁴ 22 N. Y. 180 (1860), cited *supra* note 2.

⁵ *Id.* at 183.

charging arson in the first degree committed by the burning of a dwelling house, a conviction for arson in the third degree is improper though the evidence proved the defendant had wilfully burned his goods, with intent to prejudice the insurer, for the elements of the lesser crime were no part of the greater charged in the indictment. The correct interpretation of the statute is, said the court, "that upon an indictment for an offense consisting of different degrees, the jury may, in a case in other respects proper, find the accused not guilty in the degree charged, but guilty in any inferior degree of the same offense. Such finding would be proper, where the act proved was the identical act set forth in the indictment, and where all the circumstances descriptive of the inferior degree, of which the defendant was to be convicted, were also parcels of the offense in the higher degree, and were contained in the indictment, and such finding would not be proper in any other case."⁶

Despite this clear expression of the function of the statute and its effect upon the indictment, the belief that the statute enlarged the common law rule persisted, for the same court in a subsequent opinion concluded: "* * * when the act for which the accused is indicted is the same for which he is convicted, the conviction of a lower degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of the crime, and omits to state the particular intent and circumstances characterizing a lower degree of the same crime" because "* * * the statute authorizing a conviction of a lower degree of the same crime, upon an indictment, for a higher degree, makes the evidence authorizing such conviction, competent."⁷ In

⁶ *Id.* at 185. Said Wright, J., concurring, *id.* at 187: "The statute should receive a reasonable construction. Its real meaning is, that upon an indictment charging an offense of which the statute has prescribed different degrees, the inferior degrees being generic to the superior, and the indictment containing enough to apprise the accused of the lesser charge, if the evidence, in the view of the jury, be insufficient to convict of the greater offense, but sufficient to convict of an inferior degree of such offense, the jury may find the accused guilty of the inferior degree, or of an attempt to commit the offense charged."

⁷ *Keefe v. People*, 40 N. Y. 348, 356 (1869), where it was said: "It is a general rule in criminal pleading, that when the act done is criminal only when done under a particular state of facts and circumstances, the existence of such facts and circumstances must be averred in the indictment but the section of the statute under consideration has in effect provided that when the indictment

that case the defendant was held properly convicted of murder in the second degree committed without a design to affect death while engaged in a felony, under an indictment charging murder in the first degree with malice aforethought. The same result is now obtained, but for a different reason, the view no longer being acceptable that the statute authorizing a conviction for a lower degree of the crime charged has changed the rules of evidence to permit proof of elements essential to the lower degree but not averred in the indictment for the greater crime.⁸ It is now understood that proof of the felony is in support of the allegation that the homicide committed in the course thereof was with malice aforethought for the malice necessary to constitute the felony is deemed transferred to the ensuing homicide.⁹

The application of the rule under consideration was further complicated by the enactment that in "all other cases (i.e., in crimes not consisting of different degrees) the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment",¹⁰ for it would seem, and indeed it has been so argued,¹¹ that this section was not intended to apply to trials upon crimes consisting of different degrees, so that in the latter cases, the degree of the crime found need not be "necessarily included" in the degree charged. This view was expressly rejected in the case of *People v. Miller*¹² where it

is for a crime consisting of different degrees and depending upon the intention of the accused and the circumstances under which the act was committed and the indictment charges such act to have been committed with the intent and under the circumstances constituting the highest degree of the crime the defendant may be convicted of any lesser degree, and consequently, when there is a failure of proof of any part essential to the conviction of a higher degree, proof may be given of facts constituting a lower degree of the same crime, although the facts are not charged in the indictment, and the defendant may, upon such proof, be rightly convicted of the lower crime." See *People v. McDonell*, 92 N. Y. 657 (1883), and dissenting opinion by Chase, J., in *People v. Santoro*, 229 N. Y. 277, 285, 128 N. E. 234, 237 (1920).

⁸ *People v. Santoro*, 229 N. Y. 277, 128 N. E. 234 (1920), *infra* notes 13, 25.

⁹ *People v. Enoch*, 13 Wend. 159 (N. Y. 1834), *infra* note 35. The same view had already been expressed in *People v. Jackson*, 3 Hill 92 (N. Y. 1842), *infra* notes 1, 2.

¹⁰ N. Y. CODE CRIM. PROC. § 445, *supra* note 3.

¹¹ See *People v. Connors*, 13 Misc. 582, 35 N. Y. Supp. 472 (1895).

¹² 143 App. Div. 251, 128 N. Y. Supp. 549 (1st Dept. 1911), *aff'd*, 202 N. Y. 618, 96 N. E. 1125 (1911), *infra* notes 21, 28.

was said: "Being merely declaratory of the common law, these statutes are to be construed as near to the rule and reason of the common law as may be * * *, and we are not to limit or lessen their application because, for convenience of codification, the rule has been stated in two sections instead of one. There is, therefore, no force in the suggestion that section 445 is applicable only to offenses not divided into degrees; that to such offenses only section 444 is applicable; and that under it a conviction can be had only for the crime charged or of one of the inferior 'degrees' thereof and not a misdemeanor consisting of some of the elements going to make up the crime charged. Such was not the common law rule in the State, and the statute, as we consider, has not changed the common law in this regard, and as has been said the enactment of the rule in statutory form was not designed to limit its application."

Since the lesser degree of the crime charged upon which the accused may be convicted must, conformably to the common law rule, consist of no other elements than those contained in the greater, the distinction between crimes consisting of degrees and other crimes is immaterial. In any case, the crime for which the defendant is convicted must be "necessarily included" in the crime with which he is charged. For "one crime is not a lower degree of another crime, unless the latter crime necessarily includes the ingredients of the former crime."¹³

However, prior to the amendment of the statute in 1900,¹⁴ upon an indictment for murder, a refusal to submit the crime of assault for the jury's consideration was held proper, not because an assault at common law was a misdemeanor and therefore not convictable upon a felony charge; but because "a simple assault is not one of the grades of homicide * * *", meaning that assault is not a statutory degree of murder, and "an assault in any of its degrees, we think, is not a necessary legal element in a charge of murder", meaning that murder could be committed without an assault

¹³ *People v. Santoro*, 229 N. Y. 277, 128 N. E. 234 (1920), *supra* note 8, *infra* note 25. "One crime is not necessarily included in another where they are substantively and generically separate and disconnected offenses." *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921), *infra* notes 23, 33, 34.

¹⁴ Laws of 1900, c. 625, *supra* note 3.

which therefor is not "necessarily included" in the charge of murder.¹⁵

The amendment, attributed to this decision, added the provision: "Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence. A conviction upon a charge of assault is not a bar to a subsequent prosecution for manslaughter or murder, if the person assaulted dies after the conviction, in case death results from the injury caused by the assault."¹⁶

The statutes as they now stand, therefore, authorize the conviction of a defendant accused of a crime only if the crime for which he is convicted is defined by statute, included in the charge of the indictment and proven by the evidence. Hence a study of the application of the sections involved will require a separate treatment of their effect upon the construction of the indictment, the admissibility of the evidence, and the instructions to the jury.

THE INDICTMENT.

In New York the indictment¹⁷ may be drawn in the common law form, setting forth the acts alleged to have been performed by the accused and which constitute the crime specified,¹⁸ or in a simplified form charging the crime by name or by reference to the statute defining the crime.¹⁹

If the indictment alleges the acts constituting the greater crime charged, every lesser offense constituted by each or

¹⁵ *People v. McDonald*, 159 N. Y. 309, 54 N. E. 46 (1899). In that case, however, the homicide was not denied, the defense being justification upon the claim of self-defense. The same result is now reached upon the theory that where the homicide is admitted, the defendant is either guilty of the crime or he must be acquitted, because no view of the evidence would justify the inference that only an assault was committed. *Cf. People v. Zielinski*, 247 App. Div. 573, 238 N. Y. Supp. 176 (4th Dept. 1936), *infra* note 20.

¹⁶ N. Y. CODE CRIM. PROC. § 444, *supra* note 3.

¹⁷ The rules herein treated are equally applicable to trials upon informations. *People v. Wein*, 190 App. Div. 368, 187 N. Y. Supp. 753 (2d Dept. 1921).

¹⁸ N. Y. CODE CRIM. PROC. §§ 275, 284, 295a.

¹⁹ N. Y. CODE CRIM. PROC. § 295 b, c.

some of the acts is included in the charge. "The correct rule seems to be that if the allegations of the indictment, relating to the crime charged, and not relating to the crime found, can be stricken from the indictment, and still have in the indictment sufficient allegations of the crime found, then the judgment of conviction is good, if sufficiently supported by the evidence."²⁰ Thus, in an indictment charging burglary in that the defendant "with force and arms, a certain building, etc., feloniously [and burglariously] did [break into and] enter, with intent to commit some crime therein, to wit, with intent the goods, chattels and personal property, etc., then and there, being, then and there, etc., to steal, take, carry away, etc." if the words enclosed in brackets are removed, there will be left a sufficient charge of the crime of unlawful entry, and a conviction therefor may be sustained.²¹ An indictment for robbery will include a charge of larceny for there can be no robbery without a larceny.²²

On an indictment charging the commission of a felony resulting in a homicide which details the facts and circumstances constituting the felony and the homicide in the course thereof, the defendant may be convicted of the homicide or felony, depending upon the evidence offered.²³ And an indictment for manslaughter while engaged in the commission of a misdemeanor, which sets forth the acts constituting the misdemeanor includes the lesser as a crime for which the defendant may be found guilty.²⁴

However, an indictment accusing the defendant of manslaughter for an assault by means of a deadly weapon "but without a design to effect death" does not charge assault in the first degree "with an intent to kill a human being" for

²⁰ *People v. Zielinski*, 247 App. Div. 573, 574, 288 N. Y. Supp. 176, 177 (4th Dept. 1936), *supra* note 15.

²¹ *People v. Miller*, 143 App. Div. 251, 128 N. Y. Supp. 549 (1st Dept. 1911), *aff'd*, 202 N. Y. 618, 96 N. E. 1125 (1911), *supra* note 12, *infra* note 28.

²² *People v. Kennedy*, 57 Hun 532, 11 N. Y. Supp. 244 (3d Dept. 1890).

²³ *People v. Colburn*, 162 App. Div. 651, 147 N. Y. Supp. 689 (2d Dept. 1914). The indictment in this case differs from those wherein the felony is not charged as an offense for which the accused must stand trial but is merely alleged and proven on the trial to characterize the homicide which is charged. See *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921), *supra* note 13, *infra* notes 33, 34.

²⁴ *People v. McDonald*, 49 Hun 67, 1 N. Y. Supp. 703 (5th Dept. 1888), *supra* note 1.

that intent, essential in assault in the first degree, is no part of the charge of manslaughter, and a conviction for the assault under such indictment is error.²⁵ Nor may a verdict of guilty of murder in the second degree be rendered upon an indictment charging felony murder in that defendant "without a design to affect the death of, etc., while engaged in an attempt to commit a felony, to wit, rape in the first degree, etc., did * * * kill and slay, etc.", for the intent necessary to the crime of murder in the second degree is not averred in the indictment.²⁶ And where the crime of unlawful entry is defined as entry into a building "under circumstances, or in a manner not amounting to a burglary" with an intent to commit a felony, or a larceny, or malicious mischief, no modification of an indictment charging burglary by a breaking and entering with an intent "to commit some crime," by striking out the characteristics of burglary in any of its degrees, would leave an adequate description of the misdemeanor.²⁷

If an indictment, on the other hand, presents the accusation in the simplified form by naming the crime alleged to have been committed or by specifying the section of the statute violated, every other offense necessarily included in the statutory definition of the crime named is included in the charge of the indictment.²⁸

An indictment for murder in the first degree committed from a deliberate and premeditated design to affect death may include charges upon lesser degrees of the homicide or upon the various degrees of assault, as the evidence may indicate.²⁹ However, a charge of murder committed with a deliberate and premeditated design to effect death does not

²⁵ *People v. Huson*, 114 App. Div. 693, 99 N. Y. Supp. 1081 (4th Dept. 1906), *rev'd*, 187 N. Y. 97, 79 N. E. 835 (1907) (on the ground no exception to the charge to the jury had raised a question of law to be reviewed); *People v. Santoro*, 229 N. Y. 277, 128 N. E. 234 (1920), *supra* notes 8, 13.

²⁶ *People v. Hoffman*, 219 App. Div. 334, 220 N. Y. Supp. 249 (1st Dept. 1927), *aff'd*, 245 N. Y. 588, 157 N. E. 869 (1927).

²⁷ *People v. Meegan*, 104 N. Y. 529, 11 N. E. 48 (1887).

²⁸ The statute "should be so construed as to require that the lesser offense for which a conviction might be had must be either included in the statutory definition of the crime for which the defendant is indicted or included in the acts set forth in the indictment * * *". *People v. Miller*, 143 App. Div. 251, 128 N. Y. Supp. 549 (1st Dept. 1911), *aff'd*, 202 N. Y. 618, 96 N. E. 1125 (1911), *supra* notes 12, 21.

²⁹ *People v. McGloin*, 91 N. Y. 241 (1882).

include a homicide committed in the course of a felony, the independent felony not being alleged.

In a prosecution for murder by "an act inherently dangerous to others and evincing a depraved mind, regardless of human life, although without a premeditated design to effect death,"³⁰ a conviction for manslaughter as a result of culpable negligence is proper.³¹ But, as has been indicated, a lesser offense is not necessarily included in the greater merely because it is classified as a lower degree of the same crime. Thus an indictment in the simplified form for murder, specifying felony murder, does not include any other crime, therefore in such a case the defendant must either be found guilty as charged or acquitted.³² Though the indictment will authorize a conviction of murder for the homicide while defendant was engaged in a felony, the charge does not include the felony as a crime for which the defendant stands trial and, therefore, no verdict may be rendered upon the felony.³³

However, an indictment charging murder, in a common law court, in that defendant "wilfully, feloniously and of malice aforethought, shot and killed" includes a charge of murder by homicide in the commission of a felony,³⁴ as well as premeditated murder, where intent to kill is an element, for "the malicious and premeditated intent to perpetrate one kind of felony, was, by implication of law, transferred from such offense to the homicide which was actually committed, so as to make the latter offense a killing with malice aforethought, contrary to the real fact of the case as it appeared in the evidence."³⁵ Such a charge will include manslaughter

³⁰ N. Y. PENAL LAW § 1044, subd. 2.

³¹ *People v. Voelker*, 220 App. Div. 521, 221 N. Y. Supp. 760 (4th Dept. 1927).

³² *People v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910); *People v. Chapman*, 224 N. Y. 463, 121 N. E. 381 (1918); *People v. Smith*, 187 N. Y. Supp. 836 (Sup. Ct. 1921).

³³ *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921), wherein under an indictment for common law murder evidence of the felony is admitted merely to characterize the homicide as murder with malice aforethought. The court distinguished this case from that in which the indictment does charge the felony as a crime for which a conviction might be had. See note 13, *supra*.

³⁴ *People v. Conroy*, 97 N. Y. 62 (1884); *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1002 (1889); *People v. Schermerhorn*, 203 N. Y. 57, 96 N. E. 376 (1911); *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921); *People v. Lytton*, 257 N. Y. 310, 178 N. E. 290 (1931).

³⁵ *People v. Enoch*, 13 Wend. 159, 174 (N. Y. 1834), *supra* note 9.

committed by defendant while engaged in a misdemeanor,³⁶ or murder by an act inherently dangerous evincing a depraved mind, etc.³⁷

And yet upon the trial under an indictment charging the defendant with the death of *A* while "engaged in the commission of a felony, to wit: Assault in the first degree upon the person of * * * *B* by shooting the said * * * *B* with a loaded revolver with intent to kill him" if the evidence indicates that the very assault upon *B* caused the death of *A*, the jury must be permitted to find a verdict upon the lesser degrees of homicide, for the crime proven is not felony murder, the felony merging in the homicide,³⁸ but, the necessary intent having been alleged, may be murder in the second degree or manslaughter.³⁹

THE EVIDENCE.

Being declaratory of the common law, the statutes under consideration have not varied the general rules of evidence. The view, formerly held,⁴⁰ that the statute authorizing a conviction for any lesser degree of the crime charged makes the evidence proving such lesser crime competent though the elements peculiar to the lesser are not averred in the indictment, has been discarded. Though the statute permits a conviction of assault upon a charge of manslaughter, evidence of an intent to kill not alleged in the indictment, does not justify a conviction for assault in the first degree for the words, "in any degree constituted by said act, and warranted by the evidence",⁴¹ are words of limitation; "said act" being

³⁶ *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522 (1st Dept. 1910), *aff'd*, 203 N. Y. 527, 96 N. E. 1124 (1911).

³⁷ *People v. Jernatowski*, 238 N. Y. 188, 144 N. E. 497 (1924).

³⁸ "In order, therefore, to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that while violence may constitute a part of the homicide, yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide so not to be an ingredient of the homicide, indictable therewith or convictable thereunder." *People v. Hüter*, 184 N. Y. 237, 244, 77 N. E. 6 (1906). On this topic see (1936) 10 ST. JOHN'S L. REV. 253.

³⁹ *People v. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921).

⁴⁰ *Keefe v. People*, 40 N. Y. 348 (1869), *supra* note 7.

⁴¹ N. Y. CODE CRIM. PROC. § 444, *supra* note 3.

that charged in the indictment and not merely that proven upon the trial.⁴²

The conviction of a lesser offense is not proper unless every element constituting the lesser crime is proven by the evidence. As has been said:⁴³ "Of course it is not right to convict a man of a less degree of crime simply because a jury doubt whether he committed the greater. Manslaughter is not half-proved murder, but the elements which constitute that less degree must be themselves proved."

On the other hand, if the evidence proves the crime of a higher degree it is not proper for the jury to render a verdict upon a lower offense. The statute does not clothe the jury with the authority to determine the law, but requires it to find a verdict upon the evidence. If upon a trial for robbery, the offense charged is supported by the evidence and the defense interposed is an alibi, the defendant is guilty as charged or he must be acquitted; a conviction of attempted robbery must be reversed.⁴⁴ Where the undisputed proof shows a completed burglary, the jury may not consider the offense of attempted burglary.⁴⁵ Or where upon a charge of rape, if the evidence proves the completed crime no verdict may be rendered upon assault in the first degree with an intent to commit a felony, for if the jury does not believe rape was committed, there is no evidence from which it may infer an assault with an intent to commit a felony.⁴⁶ And it has been said: "* * * one who assaults another with intent to cause

⁴² *People v. Santoro*, 229 N. Y. 277, 284, 128 N. E. 234, 237 (1920); *People v. Huson*, 114 App. Div. 693, 99 N. Y. Supp. 1081 (4th Dept. 1906), *rev'd*, 187 N. Y. 97, 79 N. E. 835 (1907), *supra* note 25.

⁴³ *People v. Downs*, 56 Hun 5, 11, 8 N. Y. Supp. 521 (3d Dept. 1890), *aff'd*, 123 N. Y. 558, 25 N. E. 988 (1890); *cf.* *People v. Young*, 96 App. Div. 33, 88 N. Y. Supp. 1063 (1st Dept. 1904), where it was said: "The verdict may not be justified by the evidence but the statute permits the jury to make the finding, and there is no power in the court to prohibit it." See also dissenting opinion in *People v. Santoro*, 229 N. Y. 277, 285, 128 N. E. 234, 237 (1920).

⁴⁴ *People v. Blakeman*, 34 N. Y. Supp. 262 (Gen. Sess. N. Y. County 1895); N. Y. PENAL LAW § 260 providing: "A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself" is applicable only to a trial upon an indictment for an attempt to commit a crime and not to a trial upon an indictment for the crime itself. See *People v. Bennett*, 182 App. Div. 871, 170 N. Y. Supp. 718 (2d Dept. 1918).

⁴⁵ *Sullivan v. People*, 27 Hun 35 (1st Dept. 1882).

⁴⁶ *People v. Aldrich*, 58 Hun 603, 11 N. Y. Supp. 464 (1st Dept. 1890); *People v. Cosad*, 1 N. Y. Supp. (2d) 132, — App. Div. — (2d Dept. 1937). But see *People v. Fagan*, 163 Misc. 495, 297 N. Y. Supp. 321 (Sup. Ct., Erie Co. 1937).

him to be unlawfully confined is not guilty of assault in the second degree, but of kidnapping." Therefore, if the crime of kidnapping has been proven no verdict may be rendered upon assault.⁴⁷

The jury, though it be the trier of the facts, may not disregard the evidence, uncontradicted and plausible. In a prosecution for murder or manslaughter the jury may, if in other respects proper, consider the crime of assault in various degrees, only where the "act complained of" is not proven to have caused the homicide charged. If the indictment accuses the defendant of manslaughter in the first degree in that defendant "wilfully and feloniously did make an assault * * * with a certain knife * * * in and upon the abdomen * * *", and the defendant denies that he committed the assault but not that the assault charged was fatal, the jury must either believe the defendant and acquit or find him guilty of manslaughter.⁴⁸ If an assault in the first degree, charged to have been committed with a deadly weapon and with an intent to kill, is proven by the prosecution, the evidence of the accused tending to prove he acted in self-defense leaves for the jury only the question of the defendant's guilt of assault in the first degree, and no verdict upon a lesser degree may be found as there is no denial that if the assault was not justifiable, it was assault in the first degree.⁴⁹ Where the evidence in support of an indictment charging manslaughter in the first degree for a homicide committed "in a cruel and unusual manner, or by means of a dangerous weapon," proves that death was caused by blows inflicted with an iron poker upon a little girl and the defendant denies having committed the assault, the jury may not find any other degree of manslaughter or assault, for if the defendant committed the assault it was manslaughter in the first degree.⁵⁰

⁴⁷ *People v. Weiss*, 252 App. Div. 463, 300 N. Y. Supp. 249 (2d Dept. 1937), *rev'd on other grounds*, 276 N. Y. 384, 12 N. E. (2d) 514 (1938).

⁴⁸ *People v. Schiavi*, 96 App. Div. 479, 89 N. Y. Supp. 364 (4th Dept. 1904), *appeal dismissed*, 180 N. Y. 546, 73 N. E. 1129 (1905); *cf.* *People v. Wheeler*, 79 App. Div. 396, 79 N. Y. Supp. 454 (4th Dept. 1903).

⁴⁹ *People v. Dartmore*, 48 Hun 321, 2 N. Y. Supp. 310 (2d Dept. 1888).

⁵⁰ *People v. DeGarmo*, 73 App. Div. 46, 76 N. Y. Supp. 477 (4th Dept. 1902), *rev'd on other grounds*, 179 N. Y. 130, 71 N. E. 736 (1904).

The conviction of a lesser degree of the crime for which the defendant is indicted can be proper only if the facts proven logically justify the verdict.⁵¹ It is, therefore, the province of the trial court to determine before its charge to the jury what offenses the jury may properly consider in view of the evidence.

THE INSTRUCTIONS.

The court's charge to the jury in criminal cases must include instructions upon the various lesser crimes upon which a verdict may be rendered depending upon the form of the indictment and the evidence offered under it.

The task placed upon the trial court with reference to this subject has proven difficult. For not only must the court accurately construe the indictment to determine what lesser crimes the indictment includes in its charge but the court must also weigh the sufficiency of the evidence adduced, leaving to the jury only such possible verdicts as may be reasonable in view of the evidence.

Though under an indictment charging murder by malice aforethought a conviction might be had for a criminal homicide not requiring malice, where the evidence indicates that the killing was deliberate and intentional, the court may not give instructions upon the crime of murder committed by an act inherently dangerous, evincing a depraved mind, etc., but without a premeditated design to effect death, for a verdict upon such offense would not be justified by the evidence.⁵² Upon an indictment for assault in the first degree by the use of a loaded revolver and with an intent to kill, the jury must not be permitted to find a verdict on assault in the third degree, for the facts prove either assault in the first or second degrees or the defendant is not guilty of any offense.⁵³

Felony murder cases present particularly difficult prob-

⁵¹ *People v. Thompson*, 198 N. Y. 396, 91 N. E. 838 (1910).

⁵² *People v. Ludkowitz*, 266 N. Y. 233, 194 N. E. 688 (1935).

⁵³ *People v. Randazzo*, 127 App. Div. 824, 112 N. Y. Supp. 104 (4th Dept. 1908).

lems for the trial court in its instructions to the jury.⁵⁴ Under an indictment in the simplified form charging murder in the commission of a felony, the intent with which the homicide was committed being immaterial, the evidence is restricted to the proof of the felony and the ensuing homicide. Hence the court need not submit lesser degrees in its charge to the jury for no other crime is "necessarily included" in that for which the defendant is tried.⁵⁵ Or under an indictment charging murder in the common law court, *i.e.*, with malice aforethought, though it permit evidence of premeditated murder, if the evidence is restricted to proof of a homicide in the commission of a felony, the court may properly charge the jury to render a verdict upon the crime of felony murder only.⁵⁶ However, under a common law murder count, if evidence is offered tending to negative the proof of the felony, the malice inferred from the proof of the felony may not be such as to characterize the homicide as murder, but such as to constitute the homicide manslaughter. Thus, if the defendant offer evidence of his intoxication from which the jury may infer that the defendant could not have had the requisite intent to commit the underlying felony, the defendant may nevertheless be guilty of manslaughter while engaged in a misdemeanor,⁵⁷ or while engaged in the commission of a trespass⁵⁸ or other invasion of a private right, and hence it would be error to refuse to submit these lesser degrees.⁵⁹

Whether or not evidence, sufficient to raise a doubt as to the defendant's ability to commit the felony, offered upon a trial under an indictment which charges not common law murder but felony murder, describing the crime by name or specifying the section of the statute violated, will require submission of lower degrees, is open to question. In the case

⁵⁴ See (1937) 6 BROOKLYN L. REV. 455.

⁵⁵ *People v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910).

⁵⁶ *People v. Seiler*, 246 N. Y. 262, 158 N. E. 615 (1927); *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931).

⁵⁷ N. Y. PENAL LAW § 1050, subd. 1.

⁵⁸ *Id.* see § 1052, subd. 1.

⁵⁹ *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *People v. Cummings*, 274 N. Y. 336, 8 N. E. (2d) 336 (1937); see *People v. Sullivan*, 274 N. Y. 591, 10 N. E. (2d) 567 (1937).

of *People v. Stevens*,⁶⁰ the indictment contained two counts, one upon common law murder, the other upon felony murder. The prosecution elected to proceed upon the felony murder count and offered its evidence thereunder. The court submitted the case to the jury on the felony murder count only, charging that it must find the defendants guilty of murder in the first degree or acquit them. The refusal to submit lesser degrees was held proper despite evidence that one of the defendants acted under coercion so as not to be guilty of the underlying felony. The dissenting opinion asserted: "The administration of justice is not so tightly bound by legalistic formulas that the life or death of an accused may be made dependent upon the manner in which a charge is formulated in the indictment. Certainly the probative value and the effect of the evidence presented to the jury cannot be changed by the form of an indictment or by choice of a District Attorney to have the case submitted to the jury under one count of an indictment rather than another."⁶¹

Admittedly, where, under a common law murder indictment, the evidence indicates that the felony merged in the homicide,⁶² or was abandoned prior to the homicide,⁶³ or that the defendant, being under sixteen years of age,⁶⁴ was incapable of committing the felony,⁶⁵ the jury may not be permitted to consider the crime of felony murder, but must be instructed as to the other degrees of criminal homicide. Yet, it would seem, if the indictment charges felony murder only by name or by specifying the section of the statute violated, the defendant is not charged with any other crime, and therefore, if the evidence fails to establish the felony and the ensuing homicide, the defendant should be acquitted.⁶⁶

⁶⁰ 272 N. Y. 373, 6 N. E. (2d) 60 (1936).

⁶¹ *People v. Stevens*, 272 N. Y. 373, 381, 6 N. E. (2d) 60, 63 (1936).

⁶² *People v. Hüter*, 184 N. Y. 237, 177 N. E. 6 (1906); *People v. Lazar*, 271 N. Y. 27, 2 N. E. (2d) 32 (1936).

⁶³ *People v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

⁶⁴ N. Y. PENAL LAW § 2186.

⁶⁵ *People v. Roper*, 259 N. Y. 170, 181 N. E. 88 (1932).

⁶⁶ The statement in *People v. Schleiman*, 197 N. Y. 383, 390, 90 N. E. 950, 953 (1910): "The conditions are exceptional, however, which warrant a refusal to instruct the jury as to their power to convict of a lower degree of the crime charged for which the defendant is upon trial and great care should be observed, as was done here, not to withhold such instruction unless the case is one like

That the form of the indictment should affect the right of the jury to consider lesser degrees, is, as we have seen, not a "mere legalistic formula", for the indictment serves to inform the accused of the charges preferred against him, the general scope of the evidence which may be offered in support of the indictment, and therefore the various lesser crimes for which he may be convicted. Any other view would deviate from the conclusion that the statutes in New York authorizing convictions for other crimes than those specified in the indictment have adopted the rule of the common law.

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that before us, where there was no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal," must be read in connection with the form of the indictment in that case which contained a common law murder count. *Cf. People v. Kropowitz*, 271 N. Y. 505, 2 N. E. (2d) 668 (1936).